In the Supreme Court of the United States

October Term, 1972

No. 72- 812
No. 72-6050

Thomas Tone Storer, et al., *Appellants,*
vs.
Edmund G. Brown, Jr., et al., *Appellees.*

Gus Hall, et al., *Appellants,*
vs.
Edmund G. Brown, Jr., *Appellee.*

Laurence H. Frommhagen, *Appellant,*
vs.
Edmund G. Brown, Jr., *Appellee.*

On Appeal from the United States District Court
for the Northern District of California

Motion to Affirm

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Pursuant to Supreme Court Rule 16 (1)(c), Appellee Edmund G. Brown, Jr., Secretary of State, State of California, hereby moves to affirm the decision in the above entitled cases on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINION BELOW

The Opinion and Order concurred in unanimously by the three judge federal court, applicable to all the above entitled cases, and as to which this single Motion to Affirm is filed, is contained in Appendix A of the Jurisdictional Statement of appellants *Storer* and *Hall,* et al.

INTRODUCTORY STATEMENT

These cases are apparently one of a number of cases which have arisen throughout the country from a failure of persons such as appellants to properly understand this Court's holding in the case of *Williams v. Rhodes,* 393 U.S. 23 (1968), as clearly explained in this Court's decision in *Jenness v. Forston,* 403 U.S. 431 (1971). Appellants significantly fail to mention this latter case in their jurisdictional statements.

California law involves an intermeshing of primary and general elections laws. Provisions are made for (1) qualification of political parties, both old and new, who participate in primary elections, for (2) independent candidates, who would participate in general elections, and for (3) write-in candidates, both at the primary and general elections.

The California election laws *in their totality* present a balance between (a) electors' rights to vote, run for office and also associate for the advancement of political beliefs, and (b) the compelling interests of the State, recognized by this Court and many other courts to prevent proliferation of candidates on the ballot by requiring a modicum of support for ballot status as well as the protection of our party system, which is the essence of our democracy.

Appellants would have this Court ignore the totality of the California system, isolate the Independent Nomination Procedure, hold unconstitutional all the substantive pro-

visions of the Independent Nomination Procedure, leaving the candidate-appellants with virtually no impediments between them and the ballot other than a requirement of a clearly insubstantial number of signatures on a petition. For example, appellants in *Storer* would have anyone who can obtain 40 signatures qualify for a place on the general election ballot for Congress.

The three judge federal court below saw through the erroneous approach of the appellants, considered California's election laws in their *totality,* and in so doing properly held that such laws in no way infringed upon the basic freedoms of appellants.

QUESTIONS PRESENTED

1. Does California law in its totality, which provides alternative means for running for office and associating for the advancement of political beliefs, and which in no way freezes the political status quo, violate the fundamental rights of the appellants?

2. Assuming, *arguendo,* that the California Independent Nomination Procedure must be examined in a vacuum, do any of its substantive provisions violate the fundamental rights of the appellants?

3. Does California law, which still permits an individual to be a write-in candidate who has left his party within the year prior to the primary election, though prohibiting him from being an independent candidate at the general election, add an additional qualification for office to the office of United States Representative?

STATUTES INVOLVED

The main statutes involved herein are:

1. California Elections Code, section 6430 defining "qualified parties."

2. California Elections Code, sections 6800 through 6920, providing the Independent Nomination Procedure.

3. California Elections Code, sections 6260 through 6263, 10229 and sections 18600 through 18604 providing for write-in votes. See also sections 10213, 10228, 10292 and 10317.

4. California Elections Code, sections 6401, 6402(a) and 6611 and specifically sections 6801, 6830(c) and 6830(d) of the Independent Nomination Procedure, *supra,* all relating to maintaining party integrity.[1]

STATEMENT OF FACTS

Appellants Storer and Frommhagen, registered as "Declines to state," each sought to have their names placed upon the ballot as independent candidates for Congress in their respective Congressional districts with the support of only 40 electors. Apparently they made absolutely no attempt to procure the requisite 5 percent signatures alleged to have been some 9,500 in Storer's district and some 7,500 in Frommhagen's district. Each was content to rely upon their belief that all the substantive provisions of the Independent Nomination Procedure were invalid, leaving only the necessity of filing papers with a few signatures with the election officials to gain ballot status in November 1972.

Appellants Hall and Tyner, admittedly members of the Communist Party, a party unable to meet the reasonable requirements for obtaining status as a "qualified party" in California, sought status as "independents" and decided also to select their own procedure for attempting to qualify for the ballot as "independents" for the offices of President

1. Hereinafter, all section references will be to the California Elections Code unless otherwise indicated. Because of the bulk of sections referred to in this motion, only key sections are included in the Appendices herein.

and Vice President by filing petitions *alleged* to contain 25,000 signatures (they were never verified). This, according to their own computations, would have been approximately 300,000 signatures fewer than the requisite 5 percent. Additionally, they sought to present themselves in the petitions as direct candidates, whereas the Independent Nomination Procedure requires *a slate of presidential electors* to be nominated as an independent slate favoring certain candidates.[2] They too also sought to invalidate all the applicable substantive provisions of the Independent Nomination Procedure to insure no impediments to ballot position in November 1972, with only insubstantial backing of the electorate.

The noncandidate appellants in each case constitute a great variety of party and nonparty voters, apparently chosen to represent every permutation and combination conceivable as between voter and candidate in the factual contexts presented, perhaps in the hope that the "shot-gun" approach might uncover a violation of some constitutional right.

The court below denied the appellants' motions for preliminary injunctions and granted the Secretary of State's motions to dismiss.

ARGUMENT

I. California's Election Laws Do Not Freeze the Status Quo, But Recognize the Fluidity of American Political Life

This Court in the case of *Jenness v. Forston,* 403 U.S. 431 (1971), pointed out that Ohio's election laws were held unconstitutional in *Williams v. Rhodes, supra,* 393 U.S. 23 (1968) because Ohio froze the status quo, thus making it virtually impossible for anyone other than a Republican or Democrat to run for president in Ohio.

2. See Sections 6800, 6803, 6804.

While *Jenness v. Forston* was cited by appellee, it was not mentioned by appellants either in their briefs below or in their jurisdictional statements herein. In *Jenness v. Forston,* this Court upheld a 5 percent signature requirement as to a "political body" or independent's ability to gain access to the ballot at the general election *vis a vis* the primary election nominee of a political party. The Court, after examining the *totality* of Georgia's laws in comparison with Ohio's, stated that:

> ". . . *Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo.* In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution." *Id.* at 438. (Emphasis added.)

Additionally, this Court held that:

> "In a word, Georgia in no way freezes the status quo, but implicitly recognizes the fluidity of American political life . . . ." *Id.* at 439.

See also *Raza Unida Party v. Bullock,* 349 F. Supp. 1272, 1279 (W. D. Tex. 1972, three-judge court):

> ". . . Following the *Jenness* command to look to the '*totality*' of a state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petiton requirement, we hold that the organization requirements are constitutionally permissible." (Emphasis added)

This is exactly what the lower court did in the instant cases. It looked at California's laws in their totality. See Appendix A to Jurisdictional Statement, *Storer* and *Hall,* pp. iv-vi.

In California "qualified parties", that is, parties qualified to participate in primary elections, are provided for in section 6430.

Pursuant to section 6430 a party may attain the status of a qualified party in California if: (1) it polled at least 2 percent of the vote at the last gubernatorial election as to any statewide candidate, subdivision (a); or (2) if on the 135th day before the primary election it had registered with its party voters equal to 1 percent of the vote cast at the last gubernatorial election, subdivision (c); or (3) if before the 135th day before the primary election, it has filed a petition signed by voters equal in number to 10 percent of the votes cast at the last gubernatorial election, subdivision (d). (Subdivision (b) apparently was enacted to provide percentage requirements when cross-filing was prevalent in California.) See *Christian Nationalist Party v. Jordan,* 49 Cal. 2d 448; 318 P.2d 473 (1957), and *Socialist Party, U.S.A. v. Jordan,* 49 Cal. 2d 864; 318 P.2d 479 (1957), *cert. denied,* 356 U.S. 952 (1957), upholding the constitutionality of the predecessor to section 6430.

Section 6430 has insured the fluidity of political life in California in the past and in recent years. In fact, in 1968 both the American Independent Party and the Peace and Freedom Party qualified for a place on the California ballot under the provisions of subdivision (c). Each had over 100,000 registered party members when they qualified. These two minor parties were on the California ballot in 1972. The Democratic and Republican Parties thus have no monopoly on political life in California, nor have they had in the past. There is no freezing of the status quo in California. Obviously, under the literal terms of the liberal subdivision (c), *supra,* there could be one hundred parties qualified for the ballot in California.

Additionally, California has a write-in procedure applicable to both primary and general elections. §§ 10213, 10228,

10292, 10317. To avoid the necessity for counting votes for persons written in in jest, the 1968 Legislature enacted sections 18600 through 18604 to provide that if a person desires to be a write-in candidate, he file a declaration to that effect and pay the filing fee. California also has write-in procedures for the presidential primary, sections 6260-6263 and presidential electors, section 10229. This past election an incumbent Democratic Congressman won the nomination of the Republican Party through the write-in process, as well as that of his own party through the conventional printed ballot. Admittedly, there was no declared Republican opposition. The significant fact, however, is that over 5,000 write-in votes were cast for various Republican Party candidates in such district.

Thus, the write-in process, at least in California is not illusory. Voters can and will use it where there is the requisite motivation to do so (see Exhibit H to Secretary of State's Points and Authorities below in *Storer*). In *Beller v. Kirk,* 328 F.Supp. 485, (S.D. Fla. 1970, three-judge court), *aff'd sub nom, Beller v. Askew,* 403 U.S. 925 (1971), where the court upheld Florida's 3 percent signature requirement for new parties, the court also held:

> ". . . There is no constitutional right to have one's name printed on the ballot . . . While not having one's name printed on the ballot may put him to some disadvantage in relation to one whose name does appear on the ballot, this does not constitute invidious discrimination, nor is it unconstitutional."

See also *Jenness v. Forston, supra,* 403 U.S. 431, 434 (1971); *Sullivan v. Grasso,* 292 F.Supp. 411, 412 (D.Conn. 1968, three-judge court); *Cf. Shankey v. Staisey,* 257 A.2d 897, 899 (1969), *cert. denied,* 396 U.S. 1038 (1970), ". . . The right of a candidate to have his name [printed] on the ballot is not . . . an absolute one. . . ."

Thus, the fluidity of political life in California is guaranteed by section 6430, *supra,* permitting new groups or parties to qualify for the ballot with a modicum of support, and also by providing the write-in process. As a *bonus,* the Legislature has also provided the Independent Nomination Procedure, which appellants solely attack here, to insure greater fluidity and to further insure that the status quo is not frozen. *To our knowledge, there is no constitutional right to such a procedure. It is truly a legislative bonus,* which, as we will demonstrate herein meets constitutional standards, even when scrutinized by itself.

II. California's Independent Nomination Procedure Is Constitutional

Assuming *arguendo,* that California's Independent Nomination Procedure must be isolated and scrutinized in a vacuum and each element dissected, it is still constitutional. See §§ 6800-6920.

A. THE 5 PERCENT SIGNATURE REQUIREMENT IS VALID AS ARE OTHER SUBSTANTIAL SIGNATURE REQUIREMENTS

Section 6831 states that "Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent . . . of the entire vote cast in the area at the preceding general election . . ."

This Court upheld the 5 percent signature requirement for independent nominees in Georgia in *Jenness v Forston, supra,* 403 U.S. 431 (1971). The appellants themselves point out that *Jackson v. Ogilvie,* 325 F.Supp. 864 (N.D.Ill. 1971, three-judge court), *aff'd mem,* 403 U.S. 925 (1971) also upheld such a 5 percent requirement. Other courts have upheld substantial signature requirements for independents or new parties. See, *e.g., Baird v. Davoren,* 346 F.Supp. 515 (D.Mass. 1972, three-judge court), 3 percent requirement;

Beller v. Kirk, supra, 328 F.Supp. 485 (S.D.Fla. 1970, three-judge court), *aff'd sub nom, Beller v. Askew,* 403 U.S. 925 (1971), 3 percent requirement.

> "There is surely an important state interest in requiring some preliminary showing of a *significant* modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. . . ." (Emphasis added.)

Jenness v. Forston, supra, 403 U.S. at 442, *re* the 5 percent requirement as to minor parties and independent candidates.

Despite these holdings, appellants asked for ballot position at the general election without the requisite *significant* modicum of support. *Storer* and *Frommhagen* claim they should have been permitted to have had their names printed on the ballot with only 40 signatures. *Hall's* and *Tyner's* position is analogous on the statewide level. Their positions border upon the ludicrous. See §§ 6080, 6082 and 6495.

B. SECTION 6830(c), INSOFAR AS IT REQUIRES SIGNATORIES WHO DID NOT VOTE AT A PRECEDING PRIMARY, IS VALID

Section 6830(c) requires a statement that ". . . each signer of [the] . . . nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office. . . ."

This Court has recognized the propriety of such a requirement at least twice in summary affirmances of lower courts. See *Moskowitz v. Power, et al.,* 305 N.Y. Supp. 2d 150 (1969), *appeal dismissed,* 396 U.S. 373 (1970); see also *Jackson v. Ogilvie, supra,* 325 F.Supp. 864, 867 (N.D.Ill. 1971, three-judge court), *aff'd mem,* 403 U.S. 925 (1971).

As stated in *Jackson v. Ogilvie, supra,* 325 F.Supp. at 867:

"... Thus, the state's scheme attempts to insure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nomination petition [for an independent]. He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in *Baker v. Carr, supra.*"

C. INSOFAR AS SECTION 6830(c) MAY HAVE PREVENTED APPELLANTS FROM BEING CANDIDATES, SUCH WAS PROPER TO INSURE PARTY INTEGRITY. THE SAME PRINCIPLES ARE APPLICABLE TO SECTION 6830(d)

As pointed out initially, California's election laws present a reasoned intermeshing of primary and general election laws. Section 6830(c),[3] insofar as it prevents candidates for independent nomination as well as their signatories from having voted in the primary election, is part and parcel of a group of statutes which insure party integrity and thus the preservation of our party system. It must be read in context as a part of the entire group of such statutes. The same reasoning applies to section 6830(d).

Section 6401 of the primary law requires a party nominee to have been affiliated with his party for three months prior to filing his nomination papers, and with no other *qualified party* for one year. The corollary provision is section 6830(d) requiring that an independent nominee also not have been registered with a qualified party for one year immediately preceding the primary election.

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3. The Secretary of State, as pointed out by appellant *Storer* took the position below that this subdivision did not bar *Storer* and *Frommhagen* from candidacy on the theory that the primary election is essentially a separate primary election for each party, and a separate one for independents who vote on nonpartisan matters. See *Schostag v. Cator,* 151 Cal. 600, 603-04; 91 Pac. 502, 503 (1907). Therefore, on such theory, an independent would not have voted at a partisan primary. The three judge federal court, however, read section 6830(c) literally.

Section 6402(a) of the primary law, and section 6801 of the independent nomination procedure both prohibit a candidate who was defeated in a partisan primary from being an independent candidate.

Section 6611 of the primary law prohibits a candidate who fails to receive his own party's nomination from being the candidate of any other political party.

And as already discussed in the previous section, section 6430(c) prevents persons who have voted in a primary from being signatories for independent candidates at the general election.

These sections in their totality achieve not only the compelling State interest against "party hopping" but also prevent *"party splintering"*, an obvious compelling interest of the State. In short, in their totality, these sections serve the compelling State interests of insuring that the party system does not disintegrate.

In holding a "24 month rule" constitutional as to party candidates, the Court in *Bendinger v. Ogilvie*, 335 F.Supp. 572 (N.D. Ill. 1971, three-judge court) set forth perhaps the finest exposition of the party integrity concept and noted that ". . . the keystone of our democracy is the party system of politics" and that "Without rules like the '24 month rule', party swapping and changing might conceivably become so prevalent that the average political party could no longer function properly." *Id.* at 575.

See also *Williams v. Rhodes, supra,* 393 U.S. 23, 31-32 (1968), implicitly recognizing the importance of the party system so long as two parties do not retain a permanent monopoly. Two parties have no monopoly in California.

Also, as recently as February 1968, the California Supreme Court held section 6401 constitutional in an unreported memorandum decision. *Peace and Freedom Party, etc., et al., v. Jordan as Secretary of State, et al.,* Sac. 7821.

D. THE TWENTY-FOUR DAY REQUIREMENT FOR OBTAINING SIGNATURES SUSTAINS THE COMPELLING STATE INTEREST OF PERMITTING VOTERS TO DECIDE WHETHER THEY SHOULD SUPPORT INDEPENDENTS

Under the provisions of section 6833 in 1972 independent nomination papers were required to have been circulated between August 15 and September 8 for the November 7 general election.

> ". . . Obviously some time limit is required as a practical matter to assure that only qualified signatures are obtained *and that the petitions reflect current attitudes of voters* . . . ." (Emphasis added.)

Moore v. Board of Elections for District of Columbia, 319 F. Supp. 437, 440-41 (D.D.C. 1970, three-judge court) upholding 54 day circulation requirement. See also *Raza Unida Party v. Bullock, supra*, 349 F. Supp. 1272, 1280-1281 (W.D. Tex. 1972, three-judge court).[4]

The party nominees are not certified by the Secretary of State until after his official canvass, and the filing of campaign statements by candidates. Under the timing of the California Elections Code this last year (the dates will vary depending upon the primary date), this was July 15, 1972. California Government Code §§ 3750-3754; Elections Code §§ 11563-11565, 18471 and 6619.

Thereafter, and dependent upon the final determination of the nominees to ascertain the delegates thereto, State conventions are held in August at which party platforms are formulated. See generally §§ 8000, 8511, 8514, 8570, 8602, 9010, 9011, 9013, 9075 and 9102.

It is certainly compelling that the candidates be officially designated and party platforms announced before voters decide whether to support existing party candidates or in-

4. *People's Party v. Tucker*, 347 F.Supp. 1 (M.D. Pa. 1972, three-judge court), relied upon by appellants fails to give proper recognition to the fact that the Communist Party met the 24 day requirement, and also fails to follow the *totality* approach of *Jenness v. Forston*. See dissenting opinion, Id. at 6, n. 6, 6-7.

dividuals desiring to run as independents. In California, as in Washington, D.C.,

> ". . . There is no restriction as to when a candidate, whether he stands in a primary or as an independent in the general election, may declare his candidacy and no time restriction on political activity. Indeed any candidate may solicit promises of signatures for his petition well before the permissible date for obtaining actual signatures."

Moore v. Board of Elections for District of Columbia, supra, 319 F.Supp. at 438.

The time after September 8, 1972 was required for checking signatures and preparing for the election. It is to be emphasized that in California, absentee voting starts 29 days before the date of the general election. All candidates must be determined and ballots ready for such purpose by that time. In 1972, such date was October 10, 1972, § 14620 *et seq.*

III. Section 6830(d) Does Not Place an Additional Qualification Upon a Congressional Candidate

At least under California law, section 6830(d) requiring an independent nominee to file a statement that he has not been affiliated with a qualified party for one year does not add an additional qualification for office in violation of article I, section 2 of the United States Constitution.

Apparently, the three judge court in the instant matters considered this contention so unsubstantial as to not even allude to it in its opinion.

Appellants in *Storer* misconstrue the differences between a qualification for office, and a qualification for independent candidacy. So long as an individual remains capable of being a write-in candidate, the Federal Constitution is in no way violated.

> "The issue here is whether the . . .[appellants were] entitled to have . . . [their] name printed on the ballot nominated by petition . . . The question is not whether

> . . . [they] may be a candidate. . . . and if electors write . . . [their] name on the ballot in sufficient numbers . . . [they] will be elected. . . ."

See *State v. Swanson*, 257 N.W. 255, 256 (Neb. 1934) *Cf. Roberts v. Cleveland*, 149 P.2d 120 (N.M. 1944). In fact, this distinction has been noted by a three judge federal court in *Stack v. Adams*, 315 F.Supp. 1295, 1298 (N.D.Fla. 1970, three-judge court). Only if the law provides an *absolute disqualification* from candidacy will article I, section 2 be violated.

In fact *Dillon v. Florina*, 340 F.Supp. 729 (D.N.M. 1972, three-judge court) solely relied upon by appellants in *Storer* in their jurisdictional statement, in no way indicated that the excluded candidate could have been a write-in candidate. Additionally, *every case* relied upon by the court in *Dillon* for its holding was a case which involved an *absolute disqualification* as to being a candidate for federal office. *Id.* at 731. Such is not the case in California.

IV. Appellants' Arguments in Storer and Hall Are Lacking in Merit

It is believed that the foregoing exposition of the facts and the law traverses all significant contentions raised in the *Storer* and *Hall* appeals. We, however, wish to comment on several of the major contentions presented to demonstrate their lack of merit specifically, and of all the appeals herein generally.

In *Storer* and *Hall* the astonishing position is taken that independent candidates, who run at the *general election*, should only have to have the same number of signatures as party candidates who run at the *primary election*. This attempt to compare apples and oranges should be obvious. Parties qualified under section 6430 have already demonstrated substantial support with the electorate. An independent has yet to do so. Therefore, potential party nomi-

nees need not do so further. The facts of political life will narrow the primary field. Also, the primary candidate must *win* at the primary election before his name can be printed on the ballot. If an independent could have his name printed on the ballot with the same number of signatures as a primary candidate, this would invidiously discriminate against all the primary candidates who failed to win their party's nomination. As this Court has pointed out in *Jenness v. Forston, supra,* 403 U.S. 431, 442 (1970) in reply to an analogous argument:

> "... Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes, supra.*

In *Storer* and *Hall,* the position is also taken unqualifiedly that "... no one has ever been able to satisfy the statutory requirements for independent candidacy." Jurisdictional Statement, pp. 9-10. Have appellants examined all the records of the Secretary of State since the procedure was first instituted in the 19th century? To our knowledge, they have not. In fact an individual *qualified and ran as an independent* for State Assembly, 40th District, at the November 1972 General Election.[5] The Secretary of State has not undertaken to examine all his records to attempt to disprove this assertion of the appellants. Other examples perhaps might be uncovered. In *Baird v. Davoren, supra,* 346 F.Supp. 515 (D.Mass. 1972, three-judge court) the court upheld the independent nomination procedure against the contentions that only twice in 33 years had independent

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5. Certified List of Candidates, General Election, November 1972, Compiled by Edmund G. Brown, Jr., Secretary of State. This is not reflected in the record below, but is a matter subject to judicial notice.

candidates qualified for the ballot. Thus, where alternative means of access to candidacy exist, difficulty is not the equivalent of unconstitutionality.

Also, appellants' statement that 70 percent of the electorate are automatically disqualified from signing nomination petitions presupposes the obvious erroneous position that 70 percent of the total electorate registered for the general election [they need not have necessarily been registered at the primary] vote at the primary election for every office. Our position below was that in the Congressional Districts involved herein, based upon registration figures, the pool of potential signatories was closer to 50 percent of the electorate than the 30 percent claimed by *Storer* and *Frommhagen.*

Insofar as appellants argue that their case is not the same as the "party hopping" cases in that there is no "independent loyalty" we merely point out the obvious. If a state may require party membership *for candidacy* to insure party loyalty for one or two years, by a parity of reasoning it can require *nonparty* membership for a like period to insure true independent status and prevent party splintering and possible disintegration of the party system, which is essential to the preservation of our political life and democracy as we know it.

V. Appellant Frommhagen's Additional Arguments Are Lacking in Merit

Basically, all the foregoing with relation to *Storer* and *Hall* is also applicable to *Frommhagen's* appeal. However, *Frommhagen* in his jurisdictional statement presents "additional argument." It is submitted that such additional argument has already been traversed. Such "additional argument's" main thrust merely indicates the obvious. There are distinctions between a party candidate at a pri-

mary election, and an aspiring independent at a general election. There are also distinctions between a party's single nominee who wins at the primary election and an aspiring independent at the general election. However, as this Court emphasized in *Jenness v. Forston, supra,* 403 U.S. at 442, this is the case. They need not be treated the same. Different logistics are required where a state, such as California, has a system of primary elections for the nomination of general election candidates:

> ". . . Indeed the requirements are different. But in a system where political primaries are an appropriate means of candidate nominations they rightfully should be different. . . ."

Jackson v. Ogilvie, supra, 325 F.Supp. 864, 868 (N.D.Ill. 1971, three judge court) *aff'd mem,* 403 U.S. 925 (1971).

Thus differences as to treatment as to when papers are filed, who are considered "qualified candidates" for purposes of section 315 of the Federal Communication Act of 1934, see section 57, and the treatment accorded candidates by the news media generally are merely part and parcel of the legal and practical differences in the logistics of political life.

Appellant *Frommhagen* may declare his candidacy any time he desires for 1974. In fact, he indicates that he has already done so: See page 5 of his jurisdictional statement. If Frommhagen's disaffection with the major parties specifically, and the party system generally is so great, California law permits him reasonable alternative measures to espouse his disaffection and associate with whomsoever he may desire to band together to gain access to the California electoral system.

CONCLUSION

The questions presented by these appeals are not substantial. Appellee Edmund G. Brown, Jr., Secretary of State of the State of California, moves that the decision of the three judge court be affirmed.

Respectfully submitted,

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(Appendices Follow)

Appendix A

California Elections Code Provisions Defining Qualified Parties—Also Signature Requirements

§ 6430. Qualified parties

"A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have partici-

pate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election."

§ 6495. Number of sponsors required

"The number of sponsors required for the respective offices are as follows:

(a) State office or United States Senate, not less than 65 nor more than 100.

(b) House of Representatives in Congress, State Senate or Assembly, Board of Equalization, or any office voted for in more than one county, and not statewide, not less than 40 nor more than 60.

(c) Candidacy in a single county or any political subdivision of a county, other than State Senate or Assembly, not less than 20 nor more than 30.

(d) When any political party has less than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.

(e) When there are less than 150 voters in the county or district in which the election is to be held, not less than 10 nor more than 20."

§ 6080. "Basis of percentage" (Presidential Primary)

"As used in this article, 'basis of percentage' means:

(a) If a party's candidate for Governor was the candidate of the party alone, the vote polled for the party's candidate for Governor at the last preceding general election at which a Governor was elected.

(b) If a party's candidate for Governor was not the candidate of that party alone, the vote polled at the last preceding general election by that one of the party's candidates voted on throughout the State who received the greatest number of votes of all of the party's candidates who were the candidates of that party alone.

(c) If a party had no candidate voted on throughout the State who was the candidate of that party alone, the vote polled at the last preceding general election by that one of the party's candidates voted on throughout the State who received the greatest number of votes of all the party's candidates who were the candidates of the party in conjunction with one or more other parties."

§ 6082. Signatures on nomination papers (Presidential Primary)

"Nomination papers for candidates for delegates of any party shall be signed by not less than one-half of 1 percent and not more than 2 percent of the vote constituting the basis of percentage."*

*See also §§ 6345 and 6347 for similar requirements applicable solely to Democratic Party.

Appendix B

California Elections Code Provisions Providing for Write-in Candidates

§ 6260. Ballot; space for write-in

"Notwithstanding any other provisions of law, a space shall be provided on the presidential primary ballot for an elector to write in the name of a candidate for President of the United States."

§ 6261. Candidate's endorsement of candidacy; filing

"Any person who believes his name may be used as a write-in candidate for President of the United States shall, not later than eight days before the primary election, file his endorsement of his write-in candidacy with the Secretary of State, or no votes shall be counted for him."

§ 6262. Delegates to national convention; selection by candidate

"Any person who receives, by write-in vote, a plurality of the votes cast for President of the United States shall, within 10 days after the primary election, file a list of delegates to the national convention of his political party with the Secretary of State in the manner prescribed in Sections 6053 and 6054."

§ 6263. Delegates to national convention; selection by state central committee

"If the candidate fails to file a list of delegates, the state central committee of the party in whose primary the candidate received the plurality vote shall within 10 days of the end of the 10-day period required in Section 6262, file a list of delegates with the Secretary of State. The delegation shall go to the convention unpledged to any candidate."

§ 10213. Ballot size

"A ballot shall not exceed 24 inches in length, and shall be three inches in width and as many times that width as may

be necessary to contain all of the names of candidates nominated, with proper blank spaces to allow the voter to write in names not printed on the ballot. The ballot shall also contain a separate column or columns of sufficient width for statements of all measures submitted to the voters."

§ 10229. Instructions to voters; presidential electors; party electors

"In elections when electors of President and Vice President of the United States are to be chosen, there shall be placed upon the ballot, in addition to the instructions to voters as provided in this article, an instruction as follows: 'To vote for all of the electors of a party, stamp a cross (+) in the square opposite the names of the presidential and vice presidential candidates of that party. A cross (+) stamped in the square opposite the name of a party and its presidential and vice presidential candidate, is a vote for all of the electors of that party, but for no other candidates.' This instruction shall appear immediately before the words: 'To vote for a person not on the ballot.'

If a group of candidates for electors has been nominated under the provisions of Chapter 3 (commencing at Section 6800) of Division 5, and has under the provisions of Article 1 (commencing at Section 6800) of that chapter designated the names of the candidates for President and Vice President of the United States for whom those candidates have pledged themselves to vote, the instructions to voters shall also contain the following:

'To vote for those electors who have pledged themselves to vote for a candidate for President and Vice President not supported by any particular party stamp a cross (+) in the square opposite the names of those presidential and vice presidential candidates.'

If a group of candidates for electors has been nominated by a party not qualified to participate in the election, the instructions to voters shall also contain the following:

'To vote for those electors who have pledged themselves to vote for a candidate for President and for Vice President of any party not qualified to participate in the election write in the names and party of those presidential and vice presidential candidates in the blank space provided for that purpose.'

The names of presidential and vice presidential candidates and a list of presidential electors of nonqualified political parties shall be filed with the Secretary of State at least 60 days prior to the election."

§ 18600. Write-in votes

"Any name written upon a ballot shall be counted, unless prohibited by Section 18603, for that name for the office under which it is written, if it is written in the blank space therefor, whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written."

§ 18601. Declaration required

"Every person who desires to have his name as written on the ballots of an election counted for a particular office shall file a declaration stating that he is a write-in candidate for the nomination for or election to the particular office and giving the title of that office."

§ 18602. Declaration; filing

"The declaration required by Section 18601 shall be filed no later than the eighth day prior to the election to which it applies. It shall be filed with the clerks, registrar of voters, or district secretary responsible for the conduct of the election in which the candidate desires to have write-in votes of his name counted."

§ 18603. Requirements for tabulation of write-in vote

"No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless

(a) A declaration has been filed pursuant to Sections 18601 and 18602 declaring a write-in candidacy for that particular person for that particular office or nomination and

(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602."

§ 18604. Write-in votes in primary election

"In a primary election, write-in votes shall be counted for each person whose name appears on a ballot as a candidate for nomination for the same office by another party, notwithstanding his failure to comply with the provisions of Sections 18601, 18602, and 18603."

Appendix C

California Elections Code Provisions—Direct Primary Law—Relating to Party Integrity

§ 6401. Party affiliation

"No declaration of candidacy for a partisan office or for membership on a county central committee shall be filed, either by the candidate himself or by sponsors on his behalf, (1) unless at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.

The county clerk shall attach a certificate to the declaration of candidacy showing the date on which the candidate registered as intending to affiliate with the political party the nomination of which he seeks, and indicating that the candidate has not been affiliated with any other political party for the 12-month period immediately preceding the filing of the declaration."

§ 6402. Independent nominees

"This chapter does not prohibit the independent nomination of candidates under the provisions of Chapter 3 (commencing at Section 6800) of this division, subject to the following limitations:

(a) A candidate whose name has been on the ballot as a candidate of a party at the direct primary and who has been defeated for that party nomination is ineligible for nomination as an independent candidate. He is also ineligible as a candidate named by a party central committee to fill a vacancy on the ballot for a general election.

(b) No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election."

§ 6611. Unsuccessful candidate; ineligibility as candidate of another party

"A candidate who fails to receive the highest number of votes for the nomination of the political party with which he was registered as affiliated on the date his declaration of candidacy or declaration of acceptance of nomination was filed with the county clerk cannot be the candidate of any other political party."

Appendix D

California Elections Code Provisions—Independent Nomination Procedure—Including Those Relating to Party Integrity

§ 6800. Scope of chapter

"A candidate for any public office, including that of presidential elector, for which no nonpartisan candidate has been nominated or elected at any primary election, may be nominated subsequent to or in lieu of a primary election pursuant to this chapter."

§ 6801. Defeated partisan candidates

"A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his party nomination at the primary election, is ineligible for nomination as an independent candidate."

§ 6803. Group of candidates for presidential electors; designation of presidential and vice presidential candidates

"Whenever a group of candidates for presidential electors, equal in number to the number of presidential electors to which this State is entitled, files a nomination paper with the Secretary of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote."

§ 6804. Printing of names on ballot

"When a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the names of the presidential candidate and vice presidential candidate designated by that group shall be printed on the

ballot pursuant to Article 1 (commencing at Section 10200) of Chapter 2 of Division 7."

§ 6830. Contents

"Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed."

§ 6831. Signatures required

"Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district

not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000."

§ 6833. Time for filing, circulation and signing; verification

"Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p.m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures."